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BURDEN OF PROOF IN PUBLICATIONS ASSAILING THE CHARACTER OF A JUDGE.

By Michigan statute and by inherent right, courts in that state have the power to punish for criminal contempt, but upon whom the burden of proof lies to prove such contempt, seems assumed without direct decision on that point in a late case decided by Michigan Supreme Court. In re Dingley, 148 N. W. 218.

In this case there appears to have been no preliminary affidavit against the contemnor as to a publication containing a violent attack on the judge of a court which was held to be an attack on the court and there was no claim that the publication interfered with any pending cause. The contemnor appeared in answer to an order issued by the circuit judge to show cause why he should not be punished for a criminal contempt because of such publication.

The contemnor admitted the publication and the court ruled that he should be punished unless he showed its contents were true. In other words, he was called on to purge himself by proving the truth of his statements.

In this case the judge who was assailed tried the case and announced that he was ready to hear any "proof as to the accuracy of the publication," and none being offered he fined the respondent.

The supreme court said: "We have no hesitancy in saying that the publication of the article, unless it is true, is in contempt of court and deserves punishment," and "the issue is to be tried by the court and not by a jury." It advises that such a case ought rather to be tried by another judge than the one assailed, and it reverses the case for undue haste in the trial.

A proceeding for criminal contempt is a proceeding to punish for a crime, and in Michigan, at least, the truth may be shown in complete exoneration. This involves, as it seems to us, the same rule in burden of proof as in any other criminal prosecution.

The universal rule in such a prosecution is for the prosecutor to put defendant upon his defense by *prima facie* evidence of his guilt.

Take the case in question and it seeems to have been conceded, that, but for respondent's admission that he published the article in question, the prosecution would have been compelled to show this. But why stop at this fact in the burden of proof, when the truth of the fact published is as much a justification as is the fact, that respondent had nothing whatever to do with the publication.

We are willing to concede that so far as contempts interfere with the orderly administration of justice, it may matter in no way whether what is said is the truth or not. For example, if one *in facie curiae* denounces a judge as being corrupt and thereby interrupts the course of a trial or interferes with the rendition of a judgment, the truth of the statement is of no concern whatever. Whether the accusation be true or false, its direct effect is no whit lessened or changed. The influence upon the rights of parties before the court is affected by the interruption and the majesty of the law is assailed, be the accusation true or false.

When, however, the same charge is made outside of court and regards past transactions, and the truth may be shown in exoneration, where or why is there a rule of presumption of falsity, which calls upon any supposed contemnor to justify a publication? It may be true, that, if a judge assailed may try the case, practically, it may amount to little where the burden of proof lies. If the judge is really corrupt, he will deny that he is in the face of any proof to the contrary.

The court says: "If the offense is committed in the presence of the judge, it would seem to follow that he should deal with the offender." But this is on the theory that the truth in such a case could not justify the offense, because the truth does not relieve in any way the commission of the offense.

Thus it was decided in Utah that where one was charged with criminal contempt committed out of the presence of the court, evidence must be taken, unless his answer amounts to a plea of guilty, and conviction cannot be rendered on pleadings that the intent and circumstances of a publication were immaterial and then be defended on the theory that the burden of proof was on the accused. Herald-Republican Pub. Co. v. Lewis, 129 Pac. 624.

The distinction between contempts in the presence of the court and those committed elsewhere is well illustrated in Goodhart v. State, 84 Conn. 60, 78 Atl. 853, where it was held that a court must be its own judge of contempt committed within its presence and it may act of its own motion without evidence and solely upon facts within its own knowledge. This rule is necessary and involves no hardship on anyone for it is of the essence of a court continuing to exist and administer justice in its appointed way. Its acts in its preservation are not a vindication of its integrity, but solely are to be regarded as a necessity to its procedure.

But it is evident that in all contempts not in the presence of the court, if evidence of facts not known to a court as a court, and not in the private capacity of one of its members, must be given, the burden of proof should rest on the prosecution. This is conceded, we believe, as to all of such contempts where the personality of the judge is not involved.

We will suppose, for example, that there is criminal contempt in assailing the integrity of one of several members of a court outside of its presence and not to affect a pending case. If it is contempt at all, it is as much so as if all of the members were assailed. Why should there be any necessity of purging before the offense is proven, if truth may justify the assault? May the other members of the court who are not assailed presume the guilt of respondent unless he justifies?

May it be said that the natural tendency of such an assault, whether based on truth or not, is to bring the court into discredit and truth, while it justifies, is like a plea in avoidance which must be proved?

The underlying question here discussed has no reference to whether criminal contempt should be tried with or without a jury, if a judge assailed may preside at the trial at all. The theory of plea in avoidance substantiated by evidence would seem in either event to call for something else than the judge's interior consciousness of his own integrity, and especially if the judgment in the case is appealable. Practically, however, if a jury is to pass upon the evidence, testimony undisputed ought to have its usual weight, and, if there is no jury trial, an appellate court ought so to regard it.

Whether, therefore, the burden of proof be upon accuser or accused in such trials, and the truth exonerates, statute ought to provide who is to hear such cases and also the rule of presumptions and the order of proof therein, unless the broad policy be declared that nothing is contempt of court not affecting pending trials or rights of parties or orderly procedure, and that *scandalum magnatum* has no place in our jurisprudence.

NOTES OF IMPORTANT DECISIONS

PARENT AND CHILD—KIDNAPPING BY FATHER OF HIS CHILD COMMITTED TO MOTHER BY AGREEMENT.—The Supreme Court of Mississippi affirms an appeal by the State of ruling on demurrer to indictment charging a father with kidnaping his own child. State v. Powe, 66 So. 207.

The indictment recited the bringing by the wife of a suit for alimony and support and the

awarding to her of the custody of two children, and its dismissal by the wife upon a settlement, by the conveyance of certain lands to the wife and an agreement by the husband surrendering to her the custody of the children. It then charges abduction by him of one of the children.

The State relied on two cases where parents were held guilty of kidnapping their own children where custody had been awarded by judicial decrees. State v. Farrar, 41 N. H. 53; In re Peck, 66 Kan. 693, 72 Pac. 265. But the court held these cases did not apply.

It was said: "The duty to support and care for his child is imposed upon the father by law. He is answerable to the state for the abandonment and failure to support his child. He cannot, by agreement with the mother of the child, relieve himself of his responsibility to the state in the performance of his duty. While this responsibility continues, certainly there goes along with it some right over the child. It should not be said that, by reason of the agreement in this case, there has been such complete annullment and dissolution of the sacred relation of parent and child as to render the father guilty of kidnapping when he takes into possession his own child. The welfare and integrity of family organization of which the father should be the head, forbids such holding. We must also bear in mind, while considering this question, that agreements for separation between married couples are not looked upon with favor."

Much of what is said in this excerpt fits quite well the awarding of custody by judicial decree. It, no more than the agreement spoken of, is intended to relieve a father from the obligation imposed upon him by law, and it and the decree would both be competent evidence in a suit for custody. The enforcement of the decree would seem rather to be left to proceedings in contempt than by prosecution under criminal law.

After all, however, it seems a little strange that one should be allowed to rely upon his obligation in one direction as a reason for disregarding his solemn agreement in another. This agreement, if lawful to be made, would at least excuse non-support and control over the child, as long at least as these were given by the parent, and custody under it would be as inviolable as under a judicial decree. We think kidnapping is the taking of any child by any person from the lawful custody of another.

RAILROADS—FAILURE TO BLOW WHISTLE AS PROXIMATE CAUSE OF KILLING GEESE ON TRACK.—The Supreme Court of North Carolina discourses very interestingly in its distinction between a "turkey case," where an engineer failed to blow a whistle when a flock of turkeys were on a track, and the case at bar, which involved the killing of a flock of geese under the same circumstances. James v. Atlantic Coast Line R. Co., 82 S. E. 1026.

The court said: "The turkey is a nervous fowl and the jury might well have found that if the whistle had been blown, the turkeys would have taken wing or have run. * * * Geese, however, are phlegmatic and slow of movement, and the blowing of the whistle or ringing the bell would not be calculated to make them run or fly."

Further along, speaking of the geese, the court said: "They have too much dignity or are too conservative to flee promptly from danger. The difference between the characteristics of a turkey and a goose is a matter of common knowledge. The turkey is long-legged, quick of movement and promptly responsive to a signal of danger. The goose is short-legged, slow to fly or run, and resentful, rather than appreciative, of a warning of danger. Though of equal intelligence probably with most other fowls, this has made its name a synonym for stupidity. While a turkey on the track would be likely to save itself by flight if the whistle were sounded in time, geese would be likely to put their heads together, or at most, waddle down the track, away from the noise."

This case was reversed, mainly it appears, because of the distinction between the turkey and the goose and a non-suit, it was held, should have been granted. Thus, while inferences are left to juries, they must not fly in the face of physical facts.

Two of the judges dissent, but without opinion, and this brings up the question whether the majority were little barefoot men in the country, while the minority were city-bred and shod. If so, the latter should spend their vacations where they might commune with Nature and learn something of her ways.

By the way, the above note anticipates our thoughts for Thanksgiving week.

APPEAL AND ERROR—EXCEPTION TO RULE OF LAW OF THE CASE BINDING SUBSEQUENT TRIALS.—The Supreme Court of Mississippi holds that the principle that the law of a case decided upon a former appeal will govern in a later apeal, irrespective of its correctness, does not apply where a right is claimed in a state court under the Constitution and laws of the United States. Louisville & N. R. Co. v. State, 65 So. 881.

Of course, it is true that state courts must yield their judgment as to a Federal question

to that of the Federal Supreme Court, but as an adverse decision to a claim of right under Federal law gives right of appeal to that court, why, if it is not taken, should not that ruling be binding in subsequent litigation? It may be, because if an appellant procures a reversal in an appellate court upon other grounds, he has no right to go further, because until he has exhausted his claims to relief under state law, no Federal right has been violated. This being true, the exception seems well recognized.

THE RULE OF CONSTRUCTION BACK OF UNIFORM STATE LAWS.

I have been greatly interested in the articles appearing in Central Law Journal by the Honorable Amasa M. Eaton, regarding the treatment of the Uniform Negotiable Instruments Law.[1]

Generally, he complains that many of the courts do not endeavor to solve questions coming plainly within specific provisions of this law by that law, but instead, without claiming that they are not provided for, they decide causes as if the law had never been enacted. If he establishes this contention assuredly he seems to put courts in the wrong.

A more interesting question rests in the fact of differing construction of the terms of this law and what authority outside of the law is helpful in its interpretation. Perhaps there may be some guide to the deposit of authority found in the seventh section of the law, which reads: "In any case not provided for in this act the rules of the law merchant shall govern." There is here no express direction that the law merchant shall be looked to in construing what the uniform act means to say as to the things it expressly speaks about, but merely there is what may be an allowable inference, that, as the law merchant is either changed in some particulars, or there is statutory declaration of its rules in other particulars, what it provided for is to be looked to in the canon of construction known as the old law, the mischief and the remedy.

This inference may seem stronger if we regard Section 7 as a direction to construe the provisions of the uniform act in the light of all that is contained in the law merchant to ascertain what it covers as changing or not changing the law merchant or as being statutory declaration of particular features of the law merchant. Certainly it ought not to be thought that lawyers proposing legislation for all of the states, with the hope that it shall receive uniform construction, would leave its interpretation without any aid in precedents. It ought not to be supposed that a law of this importance would be set adrift in the commercial world merely for literal interpretation of its terms just as if a layman, knowing nothing of the meaning of common law terms, were to decipher its meaning.

The fact that this law abounds in expression and enforces distinctions found in the law merchant lends force to the thought that wherein the latter is in any way variant, we must look to it to ascertain to what extent it has been changed. For example, Mr. Eaton says:[2] "The word or term 'surety' is nowhere used in the act, and is unknown to the law merchant. Its use in treating of the powers and duties of a party to a negotiable instrument betokens knowledge of the common law to an extent that has lead into carrying over into the field of another kind of law (the law merchant) the use of a term inappropriate to such other field." This observation occurs in his criticism of a Missouri case,[3] not as being wrongly decided, but as relying on an old case which happened to express the rule in the uniform act, the criticism being levelled at the court saying "an accommodation endorser," is in effect a "surety." This seems to show that Mr. Eaton resents going

(1) 77 Cent. L. J. 284; 78 ibid. 130; 79 id. 255.

(2) 79 Cent. L. J. 255.

(3) Osborne v. Fridrich, 134 Mo. App. 449, 114 S. W. 1045.

to any law but the law merchant to ascertain the meaning of the uniform act.

As further proof he so feels, he says, in discussion of this same case, that: "The common law doctrine of consideration so permeates the minds of lawyers and judges that it interferes with their reception and application of the fact that it is something foreign to the doctrines of the law merchant except as immediately between the parties, or when a purchaser takes with knowledge."

Reasonably then we may think, that this author, one of the framers of the negotiable instruments law, considered that the beginning and end of its construction is to be found in the law merchant and settled decision as to what that meant. In his criticism of another Missouri case[4] he disapproves of its referring to the common law rule in reference to liability on a draft by saying: "But to speak of the common law rules of the law merchant is as bad as to speak of the common law rules of equity or admiralty." The law merchant may be of our common law, but it, so far at least as this uniform act is concerned, is a system within and of itself.

Again Mr. Eaton in discussion of Missouri cases,[5] says: "Many of these opinions show much divergent views upon the subject of an antecedent or pre-existing debt as constituting value, such a remarkable frame of mind on the subject by lawyers and judges, due to too exclusive study and saturization of mind with the principles of the common law, to the exclusion of reception, retention and application of the principles of the law merchant, of the Act grounded on the law merchant, and the examination, citation and following of decisions under the Act in all the jurisdictions where it is in force, instead of following back upon the old law and old cases."

Here we seem to have it pretty plainly that if the Act needs construction, we may refer to old cases, unless decisions under the Act in other jurisdictions may be leaned to in the purpose of uniformity, but the old cases must be as to the law merchant and not to common law cases merely, which may ignore the law merchant as a special and sufficient branch of our common law, as distinguished from the common law of England.

Still more emphatically, however, he says further along that: "The act is a codification of the principles of the law merchant and is the only source of authority whereever adopted, whenever its rules are applicable. Old cases should no longer be cited as precedents, their place being taken by the decisions of courts where the act is in force." With this we do not entirely agree, because the cases construing the act do so according to the meaning of the law merchant on which it, as a codification, is based. Though the legislature intends uniformity, it cannot intend it shall be reached by a blind submission to what the court of another state has already determined. The cases may be variant and the last analysis of this position would be to take the first decision rendered and reject those coming afterwards which disagree with it, however better reasoned they may seem to be. Besides, we doubt legislative competency to declare such a rule as this. It may be said, as the federal courts says they "lean to" state construction of state laws, that courts of one state where doubts are evenly balanced will follow the courts of other states so as to attain uniformity. That the purpose of uniformity requires them to surrender their judgment of the meaning of a law I do not believe, and especially they should not follow other cases not relying on pertinent authority to sustain them. This is to say where old cases do not distinguish between the law merchant as a system and the general common law as in conflict therewith, they should not be deemed construction of a codification of the law merchant.

(4) Bank of Laddonia v. Bright Coy Com. Co., 139 Mo. App. 410, 120 S. W. 649.
(5) 79 Cent. L. J., supra.

Law Merchant as a System of Law.—But can old cases be easily distinguished—the wheat separated from the chaff—upon any such theory as is just spoken of? All of it as recognized in England may not have become a part of our common law but only such as was suited to our conditions, and I apprehend, that the codification which the Negotiable Instruments Law is said to be of the law merchant, means as that law existed with us on July 4, 1776.

But the difficulty of separation of the old cases as precedents in construction of the Negotiable Instruments Law is to distinguish those decided strictly according to the law merchant from those applying principles of the common law, outside of the law merchant, to negotiable paper. The law merchant at the time of our revolution was an unwritten law. It has been defined to be:[6] "A system of law, which does not rest essentially on the positive institutions and local customs, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world."

An early British report, translated into English in 1718, contains a case,[7] where Treby, C. J., said: "That Bills of Exchange at first were extended only to merchant strangers, trading with English merchants, and afterwards to Inland Bills between merchants trading one with another here in England and after that to all traders and dealers, and of late to all persons trading or not." At this time there was division of opinion, whether as a matter of law a bill of exchange was sufficient to maintain an action, or whether this was a jury question.

An Iowa decision[8] says: "The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and bankers, and are now recognized by the courts because they are demanded by the wants and convenience of the mercantile world," this language being used in holding that the instrument before the court was not within the law merchant because it provided that maturity might be extended indefinitely.

It seems that in England there was no codification of the law of bills of exchange until 1882, and this country may look to no English authority as conclusive of what the law merchant embraced after our declaration of independence. At all events it became a part of our common law so far as applicable to our condition at that time. Since then decision by American courts proceed on it as intact or as modified by statute, and possibly sometimes by a course of decision. It seems hard, at all events, to say what cases are unaffected entirely by such modification. For example, Mr. Eaton speaks of the word "surety" as being wholly unknown to the law merchant, and of lawyers and judges being "saturated" with common law views as to negotiable paper, but how this saturation may be analyzed and valued may be troublesome to declare.

It would seem that there is some reason for lawyers making use of the "saturation" spoken of because the law merchant being of our common law partook somewhat of its principles and as it grew up in England under the shadow of the common law, it hardly might be thought to be so distinctive in one limited sphere of its operation as to be known as a branch of the law inclusive only of what might be provided for as a statute specifying these particular things. A statute would be regarded either as providing a new rule or as carving out of the old rule application in a new way to particular things, but in subordination to general rules by way of construction.

(6) 3 Kent Comm. 2.
(7) Bromwich v. Loyd, 2 Lutw. 1582, 1585.
(8) Woodbury v. Roberts, 59 Iowa 348, 13 N. W. 312, 44 Am. Rep. 685.

The other articles of Mr. Eaton need not be referred to, because they run generally on the lines as to which specific instances are given in his discussion of Missouri courts in their treatment of the Negotiable Instruments Law.

We may refer to a very recent case,[9] not referred to by Mr. Eaton, where a court exhibits its general disposition to construe the legislation in a broad way on the line of preserving uniformity by following other state decision. There is no hint, however, in this case to old cases, founded on the law merchant, or to the law merchant itself. Of course, as the uniform act gets older, differences in construction may wear away, but the basis for uniformity is nevertheless somewhat precarious.

The Sale of Goods Act.—This act has been adopted by the legislatures of eleven states and territories, viz.: Michigan, Alaska, Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island and Wisconsin.

By the act it is provided that: "In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall continue to apply," and: "That act shall be so interpreted and construed if possible, as to effectuate its general purpose to make uniform the law of those states which enact it."[10]

Here we perceive there is quite an extensive field of law referred to for helping out omissions in the act, but whether reference is specially made to the law merchant should be taken as eliminating some of the principles of the common law as rules for construction I am unable to say. For myself I do not see how any principle under the law merchant, considering that that had to do only with negotiable paper, may be affected by a contract for a sale. The consideration for the paper may arise out of such a contract, but such a question is wholly collateral to the negotiable paper itself. When reference to the other things is made, we may surmise only that they are as under the common law, except bankruptcy, but a Louisiana lawyer might contend that the rules of the civil law might be looked to. There is room for inference, that as the law merchant, a part of our common law, was specially mentioned other rules in the remainder of our common law were meant to be embraced. How far the principle *expressio unius* may be thought to exclude this inference I am not prepared to say.

However, there is a very recent case by the Supreme Court of Errors of Connecticut[11] which shows that it looked to the common law in its construction of Section 76 of the act. This section gives definitions of words used in the act, for example that "goods" includes "all chattels personal other than things in action and money and the term includes implements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale."

The court considering whether implied warranty, as provided by Section 15 of the act, went with the supplying of food by a restaurant keeper to a customer, held that it did not, because a restaurant keeper was the same as an innkeeper at common law, except as to lodging and shelter.

As at common law the supplying of food and drink by an innkeeper did not partake of the character of the sale of goods, this warranty did not apply to a restaurant keeper, and "Our Sale of Goods Act has not, either in its definition of a sale or its provisions for implied warranty of quality,

(9) Whitcomb v. National Exch. Bank, Md., 91 Atl. 989.

(10) Sale of Goods Act, Sections 73 and 74.

(11) Merrill v. Hodson, 91 Atl. 533.

departed from the common law in any respect pertinent to this case. This becomes clear from a comparison of the common law rule and those furnished by the act."

The Connecticut court further states generally that our Sale of Goods Act "in its pertinent provision, does not differ substantially from the English act either in its definition of a sale or in respect to the subject of implied warranty, and the English act was, as its author has said, the result of an endeavor to reproduce as exactly as possible the existing law."[12]

It becomes immaterial here to go into the question whether the Connecticut ruling was right or wrong on a common law basis or on the theory that the prior English act with its construction up to the time of the enactment of our Sales Act governed, it seems, however, true that its meaning was construed with reference thereto. We may observe, however, that Louisiana, a civil law state, seems to have arrived at a different conclusion in a case where the analogy between the defendent and an innkeeper was fully as close, if not closer, than between a restaurant keeper and an innkeeper.[13] The defendant in the Louisiana case kept a confectionery where refreshments were served to the public to be consumed on the premises.

In New York where the act is in force the defendant kept a lunch room and was held liable upon an implied warranty as to the fitness of what he supplied to a customer.[14] In neither of the New York cases were the provisions of the governing act cited or discussed. In Louisiana the act has not been adopted, and it is greatly to be doubted that had it been the decision would have been different.

(12) Chalmers' Sale of Goods Act, 1893, Introduction VIII.

(13) Doyle v. Fuerst, 129 La., 838, 56 So. 906, 40 L. R. A. (N. S.) 480, 27 Am. Cas. 1110.

(14) Leahy v. Essex Co., 148 N. Y. Supp. 1063. See also Race v. Crum, 146 N. Y. Supp. 197; S. C. 147 N. Y. Supp. 818.

This may be thought sufficient in regard to the Sales Act and its construction.

Warehouse Receipts Act.—This act has been adopted in thirty states and territories and in the District of Columbia. It provides as to interpretation for the same rules as does the Sale of Goods Act.[15]

It is to be noted that the feature of intended uniformity among the states seemed to have some place in the mind of the Maryland Court of Appeals in discussing a question of repeal by implication,[16] though the court does not in terms so declare. Reasonably, we think such intent might be given weight, but as such repeal was adjudged on other grounds it was unnecessary for the court to put its conclusion on this ground.

There are other cases which have arisen under this act, but they have simply applied the terms thereof and appealed to no rule of construction to ascertain its meaning. Notably I may mention a New Jersey case which was decided by the Vice-Chancellor and reversed by the Supreme Court of Errors.[17] The latter court took the act as a whole and came to a different conclusion as to the meaning of a particular provision thereof, and naturally an excellent occasion would seem to have presented for reference to prior law or decision, but no advantage was taken of it.

Similarly was the case in several New York cases in which the act was involved.

The Bills of Lading Act.—There is the same reference in this act for a rule of interpretation as in the Sales of Goods Act and the Warehouse Receipts Act, but in the few cases that the President of the Com-

(15) Warehouse Receipts Act, Sections 56 and 57.

(16) State v. Gambrill, 115 Md. 506, 81 Atl. 10.

(17) N. J. Title Guarantee & T. Co. v. Rector, 72 Atl. 968; S. C. 75 Atl. 931.

(18) 78 Cent. L. J. 130.

missioners on Uniform State Laws refers to as having applied the Act I do not find any rule of construction alluded or any citation of authority from other states. The terms evidently were regarded as too free from ambiguity to make this necessary.

Summary.—These three acts have a wide basis in old law for rules of construction. If any fault may be found in this, it would be that it is so very wide as not to be very helpful in attaining the uniformity so very much to be desired. At all events it would seem that the rule of the civil law is more certainly excluded than might be the case as to Negotiable Instruments Law. In many ways the latter law seems to have failed in giving to the courts a certain basis for construction of its terms, and courts have openly refused to follow construction by other courts, however numerous, under the mere pressure of a desire for uniformity, while the federal courts seem still to think that the law itself has not taken away their independent judgment in regard to the law merchant, as was endeavored to be shown in one of Mr. Eaton's articles.[18]

The acts which I have alluded to in this article are all commercial in their nature and decision in regard to things they attempt to care for harks back prior to our independence. Courts also have been accustomed to cite English and other authority since that time as at least persuasive in its nature. It would seem, therefore, very important that some rule of inclusion and exclusion of old authority should be given for construction of their provisions in all cases of doubt. The narrower we may make this basis, the better it should be, because what is desired in these laws is uniformity of construction. It is not nearly of so much importance how they are to be construed as that everywhere they shall be construed in one place the same as in another.

N. C. COLLIER.

St. Louis, Mo.

MASTER AND SERVANT—NUISANCE.

WEILBACHER v. J. W. PUTTS CO.

Court of Appeals of Maryland. April 8, 1914.

91 Atl. 343.

The owner of a building employed an independent contractor to paint it, and the contractor negligently fastened the guy ropes so that the stage on which he was painting slipped, and he fell and struck plaintiff on the sidewalk below. It appeared that the work was done in the usual way, and there was no evidence that it was customary to erect guards over sidewalks above which men were painting from a suspended stage during the work. Held that, while an abutting owner causing a nuisance to be erected on his property, is not excused from liability for an injury therefrom to a person using the street because he employs an independent contractor to do the work, yet, as the suspension of the stage above the sidewalk was not such a menace to the safety of those using it as to amount to a nuisance, the owner was not liable.

THOMAS, J. (Here follows a statement of facts, unnecessary to be recited.)

[1] The first and amended second counts of the declaration declare that the injury complained of was caused by the negligence of the defendant's servants in failing to make the stage or scaffold fast by "proper guy lines," and in neglecting to "properly fasten" the scaffold "with guy lines." The evidence shows that the accident was, as alleged, due to the fact that the guy lines were not properly fastened, or, as the witness expressed it, were not "tied tight enough," but it also shows that the work was not done by the defendant, but by Crooks, Zick & Co., who contracted to do it and furnish the appliances and employed the labor for that purpose, and that the defendant did not have superivsion of the work or any control over the men engaged in it. The negligence of which the plaintiff complains in the first two counts was not, therefore, the negligence of the defendant or its servants, but the negligence of the servants of an independent contractor, for which the defendant is not liable, unless the injury to the plaintiff resulted from its disregard or neglect of some duty that it owed to her and other persons using the sidewalk on which she was injured. Deford v. State, Use of Keyser, 30 Md. 179; City & S. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Smith v. Benick, 87 Md. 10, 41 Atl. 56, 42 L. R. A. 277; Decola v. Cowan, 102 Md. 551, 62 Atl. 1026; P., B. & W. R. R. Co. v. Mitchell, 107 Md. 600, 69 Atl. 412, 17 L. R. A. (N. S.) 974.

The free and unobstructed use of the public streets is a right that belongs to the public, and it is the duty of those owning and occupying property abutting on a highway to so use their property and keep it in repair as not to endanger the public while in the exercise of that right. If, therefore, an abutting owner causes a nuisance to be erected on his property and injury to a person using the street follows as the result of the existence of the nuisance, the owner is not absolved from liability because of the fact that he employed an independent contractor to do the work. In other words, if the injury be caused by the thing contracted to be done, the owner is responsible, but he is not liable for the negligence of the employes of the contractor in a matter collateral to the contract. Again, the person for whom work is done will be liable when the injury is such as might have been anticipated by him, as the probable consequence of the work, and he failed to take the proper precaution to prevent it, or where it results from his neglect to discharge a duty that he owes to third persons or the public in the execution of the work.

(Consideration of cases here follows, which speak merely of nuisance in a street.)

In the case of Geist v. Rothschild Co., 90 Ill. App. 324, the defendant employed a contractor to paint the wall of his store. The painting was done from a scaffold suspended from the top of the building, and the scaffold was lowered and raised by ropes at the end of the scaffold. The plaintiff was injured by the falling of the ropes, the slack ends of which were coiled on the scaffold, and were in some way knocked off and struck the plaintiff. The court there said that it was a daily occurrence in large cities like Chicago for the walls of buildings on its streets to be painted, and that the fact that it was necessary to suspend a scaffold over the street in order to do it did not make it a nuisance, if the scaffold was securely suspended; that there was nothing inherently dangerous in doing the work, provided it was done by competent persons in the usual and ordinary way; and that there was no question of fact for submission to the jury in that connection. In the case of Sartirana v. N. Y. County Nat. Bank, 139 App. Div. 597, 124 N. Y. Supp. 197, the plaintiff was struck by a platform which was being lowered by means of a derrick on a building in course of construction by an independent contractor. The court held that the bank, the owner of the property, was not liable, and said:

"The work to be done here was no more intrinsically dangerous than the construction of a building along a public street usually is. * * * The building was not of extraordinary height or at all out of the ordinary, so far as exterior construction was concerned, and, unless the owner is in every case bound to guard against possible injuries to passers-by, which is not the law, the bank could not be held liable for the negligence of a contractor."

See, also, Mehler v. Fisch, 65 Misc. Rep. 549, 120 N. Y. Supp. 807.

Without meaning to go to the full extent of some of the authorities cited in the application of the rules announced, applying the principles they established to the facts of this case, we cannot hold that the suspension of the stage or scaffold from the cornice of the defendant's building created a nuisance, or that the use of the stage in painting the building rendered the work so dangerous as to require the defendant to erect covers or guards over the sidewalk in order to protect persons walking thereon, or to erect barriers to prevent persons from using the sidewalk during the progress of the work. To do so would impose a useless burden upon property owners in cities, and subject the public to unnecessary inconvenience. Of course, there is some risk incident to the projection of any object over a highway, but the duty of the owner of abutting property does not require him to provide against all possible injury, and it is only such injury as may be reasonably anticipated that he is bound to take precautions to prevent.

The appellant relies largely upon Mitchell's Case and the cases of Doll v. Ribetti, 203 Fed. 593, 121 C. C. A. 621, and McHarge v. Newcomer, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298. In Mitchell's Case, the alleged injury was inflicted by a hammer which fell from a bridge being erected over one of the public streets of Havre de Grace, and struck the plaintiff's umbrella as she was passing along the street under the bridge, and the court said:

"There is evidence in the record tending to show that in the construction of such bridges, when the workmen are engaged in riveting the ties and braces between the girders composing the span, they are compelled to work with great rapidity in order to put the rivets in place and clench them while at a white or red heat, and as a result rivets, tools and other articles handled with such rapidity, frequently fall to the ground beneath and render it unsafe for travel, unless properly guarded. There is like evidence that in the construction of the bridge now in question, such objects did, in fact, frequently fall upon the street below it, and that no precautions were taken to hinder the public from passing under the bridge or

to prevent the falling of the objects from it."

In the case of McHarge v. Newcomer, supra, the plaintiff, while passing along the street, was struck by a heavy awning roller which was "allowed by a party repairing the awning in some way shown to suddenly fall upon her." The defendants offered no evidence explaining the falling of the roller, but introduced proof to show that the awning was being repaired by an independent contractor. The Supreme Court of Tennessee held that the awning was a nuisance, and held further "that the work contracted for involved a thing intrinsically dangerous to the public, from which injuries to those using the street were probable and might reasonably be anticipated by the proprietor," and, in conclusion, said:

"The awning of the defendants, so far as it appears from this record, was being repaired by that contractor, over a much frequented street, in a populous city, and at a place where persons were constantly coming and going and standing, upon the invitation of the defendants, for the purpose of trading with them and taking the street cars, without any precautions taken to prevent portions of the awning, material, or tools from falling on those below."

In the case of Doll v. Ribetti, supra, the syllabus contains the following statement:

"Where defendant, a tenant of a building erected flush with the sidewalk, permitted the servant of an independent contractor to stand on the window ledges to clean windows on the outside without providing scaffolding or other safety appliances, and the servant fell and injured plaintiff, who was walking past the building, whether the tenant was negligent in not providing scaffolds or safety appliances was for the jury."

The statement of claim in that case charged:

"That in the said city of Pittsburg, it had been a custom to have the windows of such buildings cleaned by persons standing outside of the sash and on the sills of the windows, secured from falling by a stout belt worn about the waist, with a strap on each side thereof, fastened to a hook or other fixture set for the purpose in the side frames or casing of each window."

It further averred "that the building occupied by the defendant was not, and never had been, provided with such hooks, or with any other fit or appropriate fixtures for the purpose stated," and that the defendant, long prior to the day of the accident, "knew, or, by the exercise of reasonable care, should have known, that the windows of the building were not equipped with the customary hooks or other appropriate fixtures," etc., and that, while the servant of the contractor was engaged in cleaning the window on the fourth floor of the building, he accidentally lost his balance and fell upon the plaintiff, who was walking upon the sidewalk below. The court said that the facts alleged in the statement of claim were for the most part undisputed, "and that there was evidence tending to support all of the allegations of fact upon which were based the charge of negligence of the defendant." In that case, therefore, the negligence of the defendant alleged and shown by the evidence was his failure to furnish the appliances and safeguards usually provided by the owner or occupier of a building to prevent those engaged in washing the windows from falling.

The distinction between those cases and the case at bar is obvious. Here the evidence shows that the accident was due to the failure of the servants of Crooks, Zick & Co. to properly fasten or tie the guy lines. There is no evidence to show that the defendant neglected to provide any safety appliance that was customarily supplied by the owner of the building, or that it was a common occurrence for painters to fall from a suspended stage or scaffold.

Finding no error in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

NOTE.—*Liability of Owner of Building to Pedestrian for Negligence of Independent Contractor.*—The distinction that will be attempted to be drawn in this note is that an owner owes a duty to pedestrians on the street, and while he may employ a contractor to do work on his building and he will not be responsible for his negligence in the doing thereof, yet he cannot place such contractor in a place or authorize him to work in a place so insecure that damage may result to such pedestrians. For example, if a servant of the contractor be placed in a proper place to do his work, lets fall a tool (Pearson v. Cox, [1877] L. R. C. P., Div. 369, 36 L. T. N. S. 495; Fitzpatrick v. Chicago & W. I. R. Co., 31 Ill. App. 649) or a brick (Boomer v. Wilbur, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; Smith v. Milwaukee B. & T. Exch., 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912) or a coil of rope (90 Ill. App. 324) or a plank (Long v. Moon, 107 Mo. 334, 17 S. W. 810) which injures a pedestrian on the street, this brings no liability on the owner. Neither does the use of any appliance which, by its noise causes a horse on the street to run away and injure a pedestrian bring any liability to such an owner (City & S. R. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345). All of these things occur in the doing of the work under conditions not inherently dangerous. Samuelson v. Iron Min. Co., 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456.

But it seems to be another question, when an injury results not from the doing of the work but in where it is done, even though the safety of the place of doing it changes with the progress of the work. The rule is expressed in Chicago v. Robbins, 2 Black. 418, 17 L. Ed. 298, and reaffirmed s. c. 4 Wall. 657, 18 L. Ed. 427. In the latter case it was said: "Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." See also Hawner v. Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828.

Now, applying the above principle to the instant case, it may be asked whether the owner could entrust to the contractor the proper fastening of the guy ropes and thereby absolve himself from responsibility? It seems certain, that he could not authorize him to go upon a negligently fastened stage and do his work. Does not the owner have to get beyond a properly fastened stage before his exemption from liability begins? Just as it is said above, he could not tell a contractor to put his employees upon an insecurely fastened stage, so it would seem he could not stand by and see him put them upon a stage he had insecurely fastened. Is he not bound, then, to see that the stage is at all times kept as a safe place for the doing of the work contracted to be done?

Doll v. Ribetti, 206 Fed. 593, 121 C. C. A. 621, seems quite close to this question. In this case there was a contract to clean the windows of a building flush with the sidewalk and six stories high. The employees failed to use safety appliances and one of them fell to the street, striking and injuring plaintiff passing by. The court held it was an inherently dangerous thing to clean windows in the absence of these appliances and the owner of the building was liable. It is evident, that such appliances were put on and taken off by employees in the course of their work and, therefore, by the decision it was impliedly ruled, that the house owner must see to it that they put them on when necessary after they had laid them off when unnecessary to be used.

The court reasoned that the principle, stated in Bridge Co. v. Steinbrock, 61 Ohio St. 223, 55 N. E. 619, 76 Am. St. Rep. 375, that: "The weight of reason and authority is to the effect that where a party is under a duty to the public or third person, to see that work he is about to have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. * * * It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work," was a correct principle. We think, however, the language used is too broad and would include such negligences as we have above instanced, where these are reasonably expected to occur. See Jager v. Adams, 123 Mass. 26, 25 Am. Rep. 7.

It may be said that the facts in the Steinbrock case did not require such a broad statement as was made. There was a ruined wall that a contractor agreed to raze and there was negligence in taking it down. But this case, where liability of owner was adjudged, was far within the principle of allowing contractor's servants to work on a stage overhanging a street, that was insecurely fastened. We may conceive it not to be a nuisance to work on a securely fastened stage in such position, but it certainly would seem to be a nuisance to permit one to work thereon if it were insecurely fastened.

In such case the work is wrongful in itself, and the injury results from the place in which it is performed. R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. R. 231; James v. McMinimy, 93 Ky. 471, 40 Am. St. Rep. 200; Wiggin v. St. Louis, 135 Mo. 558.

If the contractee brings on the injury though contractor works in the most careful way, the contractee is liable. Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224.

A late Tennessee case referred to in the instant case and attempted to be distinguished, seems to us not distinguishable as attempted. McHarge v. Newcomer, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A., N. S. 298. The awning in that case was no more a nuisance than the insecurely fastened stage in the instant case, and while the stage may have been made unsafe by the contractor's servants not securely fastening it, yet, according to the Doll case, *supra*, it was the duty of the contractee to see that it was kept safe.

It seems to us that there was fully as much duty by an owner to see that the stage in the instant case was kept safe as the work progressed as that it was safe when the work was entered upon. Whenever it became insecurely fastened, from that moment it was a nuisance on the street, far more than an employee cleaning a window in a six-story building without having about him safety appliances to prevent his falling.

C.

ITEMS OF PROFESSIONAL INTEREST.

SOME RECENT "OPINIONS."

Some recent "opinions" handed down in the courts of Western and Southern states are inexcusably prolix and, moreover, flagrantly violate the proprieties of judicial life. The report of Fondren v. State, in the Court of Criminal Appeals of Texas (169 S. W. 411), including the opinions on a rehearing—rehearings are very common in that tribunal in cases of any importance—occupies more than twenty-six

pages of the Southwestern Reporter, and a judge who dissents includes, as part of his dissenting opinion on the rehearing, an argument of counsel for the unsuccessful party, filling about six and one-half pages of double column fine print. The report of Brown v. State, in the same court (169 S. W. 436)—including that of the inevitable rehearing—fills about thirty-nine pages of the Southwestern Reporter, and the same judge, who again dissents, adopts and directs to be included as part of his opinion an argument of counsel comprising nearly ten pages of double column fine print. It is true that these were criminal cases and involved questions of considerable interest. But nothing appears to justify such elaborate discussion; much of it, indeed, was not only unnecessary, but palpably irrelevant. The inclusion by incorporation of briefs of counsel is particularly unjustifiable and absurd in the case of dissenting opinions, and this we say without at all approving the suggestion that has often been made for the suppression of dissenting opinions altogether. It would seem that this new abuse of opinion writing and legal reporting should meet with prompt protest from members of the bar everywhere.

On October 1, 1914, we called attention to the case of Ex parte Crump (135 Pac. 428), in which the Supreme Court of Oklahoma held valid and irrevocable a pardon granted by the Lieutenant-Governor during a twenty-four hours' absence from the State of the Governor, of a person who had been duly convicted and was serving a sentence for forgery. We expressed the view that the case was wrongly decided, and also called attention to the fact that the report contained an account of a letter written by the Governor to a convention of Governors, protesting against the decision, and a reply by the judge writing the opinion resenting, in acrimonious language, the Governor's communication to outsiders. The whole episode was very undignified and contrary to the best traditions of judicial conduct.

The report of the decision of the Supreme Court of Utah, in Harrison v. Harker (142 Pac. 716), which was a habeas corpus proceeding to determine the custody of a child, covers, including prevailing and dissenting opinions on original hearing and rehearing, nearly forty double column pages of the Pacific Reporter. The majority opinions include considerable tawdry sentiment and rhetoric and a dissenting opinion by the Chief Justice contains such amenities as the following:

"The foregoing observations directing attention to wherein the prevailing opinion offends against the Constitution are attempted to be met, or, more correctly speaking, evaded, by Mr. Justice Frick in the following language."

* * * * * * * * *

"The members of this court have taken an oath that they will 'support, *obey* and defend the Constitution of the United States and the Constitution of this State,' etc. (Italics mine.) Is it possible that Mr. Justice Frick regards his oath of office and the provision of the Constitution mentioned as possessing 'the distinction of novelty if nothing else,' and for that reason he is relieved from observing the one and from obeying the other?"

* * * * * * * * *

"In the course of his opinion, Mr. Justice Frick says:

'I am a total stranger to all the parties to this action, and therefore can have no bias either for or against either of them.'

Nothing having been said, either oral or written, from which it can be inferred that anyone has the slightest suspicion that Mr. Justice Frick is either consciously or unconsciously biased for or against any party connected with or affected by the action, I fail to grasp the purpose or to comprehend the materiality of this somewhat unusual declaration by a judicial officer, whose integrity, fair-mindedness, and impartiality in deciding cases has never been, and I do not think ever will be, questioned, regardless of whether he may or may not have a personal acquaintance with one or more persons who may be a party or parties to an action litigated in this court. It cannot be that the statement is intended to convey the impression that, because he is a stranger to the parties, and hence free from bias, Mr. Justice Frick is therefore less likely to err in his consideration of the case than his associates, because, as he is aware, it developed during the oral discussions of the case in the consultation room that the members of this court, one and all, are total strangers to all of the parties to the action, and that they knew nothing of the case, except what the record discloses. A judicial officer coming forward in defense of his own integrity and fair-mindedness, which is not questioned by anyone, may not the members of the legal profession, and the laymen as well, who may chance to read the opinion containing such matter, conclude that there is a bare possibility that it was impelled by the same state of mind that causes a certain class of people mentioned in Holy Writ 'to flee when no man pursueth,' namely, a troubled, rather than a tranquil and undisturbed conscience?"

Extended comment upon the above examples is unnecessary. It seems proper, however, to bring them to notice with a view of

discouraging the growth of such abuses and improprieties by an aroused sentiment among members of the bar.—New York Law Journal.

Note.—While our esteemed contemporary was commenting he might have ventured an observation or two on appellate courts laying down propositions of law as being ruled which have no support in agreement by a majority of the court, some of the members merely concurring in the result. This feature was discussed by this journal in 79 Cent. L. J. 3. There is nothing tending more to confuse precedent than such opinions as these.—Editor Central Law Journal.

PROGRAM FOR THE FIFTH ANNUAL MEETING OF THE CALIFORNIA BAR ASSOCIATION.

The fifth annual meeting of the California Bar Association will be, according to the advance announcement, at Oakland, November 19 to 21st, inclusive.

The program includes the president's annual address, on Thursday afternoon, November 19th, by Hon. Wm. J. Hunsaker.

Reports of committees and an automobile ride for the members are included in the work of that afternoon.

In the evening of the same day, the principal address will be by Hon. Matt I. Sullivan, Chief Justice of the Supreme Court of California, and the subject of his paper will be, "Law's Delays and Remedies Suggested."

On Friday morning, November 20th, Hon. Walter Bordwell will deliver the annual address, which will be followed by reports of the various standing committees.

On Friday afternoon, at two o'clock, Hon. Walton J. Wood will read a paper on the subject, "The Place of the Public Defender In the Administration of Justice."

The afternoon of Friday will be devoted to memorial addresses.

On Friday evening the annual banquet will be at the Hotel Oakland.

Saturday, November 21st, will be given over to unfinished business and the election of officers, together with several amusement features.

BOOKS RECEIVED.

Jurisdiction of the Federal Courts. By the late Amos M. Thayer, United States Circuit Judge, Eighth Circuit. Revised and annotated by Byron F. Babbitt, of the St. Louis Bar, United States Commissioner Eastern Judicial District of Missouri. Includes the Judicial Code and the new Equity Rules. Price, $2.50. F. H. Thomas Law Book Company, St. Louis, 1914. Review will follow.

Where the People Rule, or the Initiative and Referendum, Direct Primary Law and the Recall in Use in the State of Oregon. By Gilbert L. Hedges, B. A., LL. B. Price, $2.50. San Francisco Bender-Moss Company, 1914. Review will follow.

HUMOR OF THE LAW.

A Georgia magistrate was perplexed by the conflicting claims of two negro women for a baby, each contending that she was the mother of it. The judge remembered Solomon, and, drawing a bowie knife from his boot, declared that he would give half to each. The women were shocked, but had no doubt of the authority and purpose of the judge to make the proposed compromise. "Don't do that, boss," they both screamed, in unison. "You can keep it yourself."—Case and Comment.

In the early days of Arizona an elderly and pompous chief justice was presiding at the trial of a celebrated murder case. An aged negro had been ruthlessly killed, and the only eye-witness to the murder was a very small negro boy. When he was called to give his testimony the lawyer for the defense objected on the ground that he was too young to know the nature of an oath, and, in examining him, asked:

"What would happen to you if you told a lie?"

"De debil 'ud git me," the boy replied.

"Yes, and I'd get you," sternly said the chief justice.

"Dat's jus' what I said!" answered the boy. —National Monthly.

Representative John L. Burnett, of Alabama, is the midget of the House of Representatives. While he is large of girth, and has absolutely no neck at all, he is surprisingly short of stature, says the Popular Magazine.

When he first opened his law office in his home town, he was employed to defend a mountaineer charged with a petty offense. When the case was called in court the judge asked the defendant if he had a lawyer to defend him.

"Yes, your Honor, I had one, but I don't see him here this morning," said the mountaineer.

"What is his name?" asked the judge.

"I don't remember his name."

"Well, what did he look like?"

"He looked like the jack of spades."

"Mr. Sheriff," promptly ordered the judge, "call John Burnett."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Arson**—Curtilage.—A buggy house separated from the dwelling of the owner by a public highway with a yard between the dwelling and the highway and the dwelling and yard inclosed by a paling fence held not within the "curtilage" of the dwelling as a matter of law.—Holland v. State, Ala., 65 So. 920.

2. **Bankruptcy**—Conditional Sale.—Where a conditional sale contract did not identify the property, and there was no identification of invoices of goods sold as the goods intended to be covered, the contract was void as against the buyer's trustee in bankruptcy exercising tht rights of a lien creditor.—Meier & Frank Co. v. Sabin, U. S. C. C. A., 214 Fed. 231.

3.——Involuntary.—Where involuntary bankruptcy proceedings were instituted on the ground that the bankrupt had made a general assignment for the benefit of creditors, the order of adjudication held not res judicata that the transfer was a general assignment.—In re McCrum, U. S. C. C. A., 214 Fed. 207.

4.——Pledge.—A pledge of certain warehouse receipts for whisky belonging to a corporation executed first by one who was permitted to act as president of the corporation, though not duly elected, and afterwards renewed by him when he had been elected president, held valid as against the corporation's trustee in bankruptcy.—In re Miller Pure Rye Distilling Co. of Pennsylvania, U. S. C. C. A., 214 Fed. 189.

5.——Preference.—Transfer by bankrupt in trust to secure party who executed indemnity bond to bonding company, which gave a bond to secure the discharge of lien of an attachment obtained within four months before bankruptcy, held valid unless intended to create a preference or defraud creditors or unless the bonding company had reason to believe that such was its purpose.—In re Federal Biscuit Co., U. S. C. C. A., 214 Fed. 221.

6.——Preference.—Where a bankrupt in good faith and for present consideration executed a chattel mortgage on all its property, which mortgage provided that the bankrupt might sell a portion of the property without liability to account therefor to the mortgagee, the mortgage was not thereby rendered void as against the trustee, except as to the property the bankrupt was so authorized to sell.—Peterson v. Sabin, U. S. C. C. A., 214 Fed. 234.

7.——Release.—The bankruptcy court could not enjoin a suit in a state court on a claim from which a discharge would be a release for more than 12 months after the adjudication, where the bankrupt did not within that time apply for a discharge.—In re Federal Biscuit Co., U. S. C. C. A., 214 Fed. 221.

8. **Bills and Notes**—Attorney Fee.—A provision in a note for the payment of attorney's fees if the note should not be paid at maturity and should be placed in the hands of an attorney for collection was valid.—Bank of Neelyville v. Lee, Mo., 168 S. W. 796.

9.——Collateral.—Where the note of a third person, deposited as collateral for a loan, is sold by the pledgee, the purchaser may enforce the face amount of the note, though he bought for less than par.—Burnes v. New Mineral Fertilizer Co., Mass., 105 N. E. 1074.

10. **Burglary**—Possession of Stolen Property.—The recent possession of stolen goods, if not satisfactorily explained, will authorize a conviction of burglary, where the corpus delicti is established.—Scott v. State, Ga., 82 S. E. 376.

11. **Carriers of Goods**—Bill of Lading.—An agent of a carrier has no authority to issue a bill of lading for goods before the same are received for shipment, and a carrier is not responsible for the unauthorized acts of an agent issuing a bill of lading before receiving the goods.—Louisville & N. R. Co. v. National Park Bank of New York, Ala., 65 So. 1003.

12. **Carriers of Passengers**—Derailment.—In a passenger's action for injury from the derailment of a car, where the motorman had stated that because of wet leaves on the track he had lost control of it, evidence that subsequent thereto he had operated similar cars under similar conditions without accident or loss of control held admissible on the issue of negligence.—Birmingham Ry., Light & Power Co. v. Friedman, Ala., 65 So. 939.

13.——Free Pass.—Where the transportation of a passenger is a mere gratuity, the carrier is not liable for injuries sustained by such passenger; but, if the person injured is a passenger for hire, then the carrier is liable.—Hageman v. Puget Sound Electric Ry., Wash., 141 Pac. 1027.

14. **Conspiracy**—Proximate Cause.—The gist of an action for a conspiracy is the damage and not the conspiracy, and the damage must have been the natural and proximate consequences of the act of the conspirators.—Louisville & N. R. Co. v. National Park Bank of New York, Ala. 65 So. 1003.

15. **Contempt**—Publication.—Publication of a so-called tirade of the circuit judge against the prosecuting attorney, with charges that the judge had interfered with the business of the grand jury, had used it as a club to get even with persons he did not like, and had made untrue statements about the prosecuting attorney, if not true, held a contempt of court deserving of punishment.—In re Dingley, Mich., 148 N. W. 218.

16. **Contracts**—Pleading.—One cannot declare upon an express contract and then recover upon a quantum meruit.—Stanley v. Whitlow, Mo., 168 S. W. 840.

17.——Presumption.—A contracting party is ordinarily presumed to know, not only the laws of the country where he dwells, but also

those of the foreign country or state in which he transacts business.—Klein v. Keller, Okla., 141 Pac. 1117.

18. **Copyrights** — Forfeiture.—An author, who copyrighted a play under one title and thereafter adopted another title, under which it was produced, did not thereby forfeit her copyright as against an infringer with full knowledge of all the facts.—Collier v. Imp. Films Co., U. S. D. C., 214 Fed. 272.

19. **Corporations**—Inspection of Books.—A minority stockholder who occupied a position antagonistic to the interests of the corporation, and who alone attacked the acts of its officers, held not entitled to inspection of the books of the corporation.—In re De Vengoechea, N. J., 91 Atl. 314.

20.——Minority Stockholder.—Minority stockholders of a corporation were entitled to an accounting against the directors, the holders of a majority of the stock of the corporation, for stock issued to themselves as a gratuity, and for dividends paid thereon and for which they had refused to account.—Granara v. Italian Catholic Cemetery Ass'n., Mass., 105 N. E. 1073.

21.——Presumption of Fraud.—The action of directors in leasing the entire corporate property to another corporation is presumably fraudulent where another equally responsible party offers, with their knowledge, to pay a much greater rental, especially where the directors voting for the lease are financially interested in the lessee corporation.—Schmid v. Lancaster Ave. Theater Co., Pa., 91 Atl. 363.

22. **Covenants**—Enforcement.—The right to enforce a restrictive covenant in all deeds given by an owner improving and developing a tract according to a general building scheme inures to each grantee as members of a class, and they may join in a suit to enjoin a breach by other grantees of the covenant.—Henderson v. Champion, N. J., 91 Atl. 332.

23.——Indemnification.—While a covenant against incumbrances is broken by the existence of an incumbrance, as soon as made, it is merely a covenant to indemnify, and, until he has removed or extinguished the incumbrance, he cannot recover the amount thereof.—Wright v. Boggess, Cal., 141 Pac. 1082.

24.——Running With Land.—A covenant broken at the time of the conveyance is merely personal and does not run with the land or confer any right of action on subsequent purchasers.—Bryant v. Mosher, Neb., 148 N. W. 329.

25. **Criminal Law**—Attempt.—To constitute an attempt to commit a crime, accused's acts must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.—People v. Grubb, Cal., 141 Pac. 1051.

26.——Husband and Wife.—The wife is incompetent to make the affidavit on which the warrant is based, or to sign an accusation charging her husband with adultery.—Bell v. State, Ga., 82 S. E. 376.

27.——Principal.—A principal in the first degree" is the actual or absolute perpetrator of the crime and where a crime is committed in the absence of the offender, as where it was caused by means prepared beforehand, he is a principal in that degree.—Pierce v. State, Tenn., 168 S. W. 851.

28.——Res Gestae.—Where, shortly before the killing, accused and deceased had a difficulty, and accused left the place, not returning for some minutes, the state, while entitled to show the happenings of the difficulty, cannot show the particulars; the difficulty not being part of the res gestae.—Wells v. State, Ala., 65 So. 950.

29. **Damages**—Minimizing.—It was the duty of the sender of a telegram ordering machinery shipped to it, on discovering that the company had failed to correctly transmit and deliver it, to minimize the damages in so far as it could under all the circumstances.—Western Union Telegraph Co. v. Jackson Lumber Co., Ala., 65 So. 962.

30.——Physical Examination.—Where it appeared that defendant had been misled by plaintiff in the physical examination made to ascertain the extent of the injury, it was error to refuse to permit a second examination.—Rief v. Great Northern Ry. Co., Minn., 148 N. W. 309.

31. **Death** — Imputable Negligence.—While negligence of a parent cannot be imputed to an injured child in the latter's action for injuries, it will bar the parents' action growing out of the same injury.—Jentsen v. Kansas City, Mo., 168 S. W. 827.

32. **Equity**—Clean Hands.—It is sufficient to establish that complainant is not entitled to relief, if it appears that he has been guilty of unscrupulous practices, over-reaching, concealment of important facts, trickery, unconscientious conduct, or the taking of an undue advantage of his position.—Barton v. Little, Ala., 65 So. 951.

33. **Estoppel**—Defined.—To constitute an estoppel by conduct there must be a false representation to, or a false concealment of material facts from, a party ignorant of the truth, by one having knowledge of the facts, with intention that the other party shall act thereon, and the other party must be induced to act thereon.—Bank of Neelyville v. Lee, Mo., 168 S. W. 796.

34.——Inurement of Title.—Under a warranty deed of timber executed in good faith by the warrantor who in fact had no title thereto, but who afterwards acquired title by purchase, equity would decree that the title inure to the benefit of the grantee's successor in interest, and that title be conveyed to him on payment of the amount paid to acquire title.—Mississippi Sawmill Co. v. Douglas, Miss., 64 So. 885.

35. **Evidence**—Non-Production of.—The one person who must have seen the fall, and known what caused it, having been working for defendant at the time of the trial, and not having been called by it as a witness in a servant's action for the injury, the inference is that his testimony would not have been favorable to it.—Vannest v. Missouri, K. & T. Ry. Co., Mo., 168 S. W. 782.

36.——Prima Facie.—Prima facie evidence means evidence "which, standing alone and unexplained," maintains the proposition and warrants "the conclusion to support which it is introduced."—Chandler v. Prince, Mass., 105 N. E. 1076.

37. **Fraudulent Conveyances**—Bulk Sales Law.—The admitted violation of the Bulk Sales Law gives jurisdiction of a bill by a creditor, joining other creditors of the seller, to apply the property by declaring the purchaser a receiver in trust for creditors, and by an injunction and an accounting.—Humiston, Keeling & Co. v. Yore, Mich., 148 N. W. 266.

38.——Intent.—A creditor who assails a transfer by a husband to his wife may succeed by showing a fraudulent intent on the part of the husband or the wife, unless the wife shows that she paid a valuable consideration, in which case there must be proof of a fraudulent intent on her part or notice of the fraudulent intent of the husband.—Wilcox v. Downing, Conn., 91 Atl. 262.

39. **Homicide**—Deadly Weapon.—A pocketknife with a blade from 2 to 2½ inches long is not per se a deadly weapon.—Reeves v. State, Tex., 168 S. W. 860.

40.——Retreat.—A householder, when an intruder attempts to break in, need not retreat, but may, if necessary, kill the intruder.—State v. Perkins, Conn., 91 Atl. 265.

41.——Third Person.—Where accused shot and killed his wife while intending to shoot a third person, the killing could be reduced only to murder on implied malice.—Hill v. State, Tex., 168 S. W. 864.

42. **Husband and Wife**—Broker.—Under Rev. St. 1909, §§ 1753, 2769, 2772 and 8304, it is not improper, where a husband and wife both solicited brokers to effect an exchange of their land, for the brokers, in an action for compensation, to join the wife with her husband.—Stanley v. Whitlow, Mo., 168 S. W. 840.

43. **Indemnity**—Action.—Where a bond is merely for indemnity, damage must be sustained before action can be maintained on it; but if it is one to do the thing which is to prevent the damage to the obligor, neglect to do such act gives an immediate right of action.—Loewenthal v. McElroy, Mo., 168 S. W. 813.

44. **Injunction** — Building Restrictions.—Where the owners of land divide it into lots, which they sell under a general plan by deeds containing a building restriction, one purchaser may enjoin another from violating such restriction.—Velie v. Richardson, Minn., 148 N. W. 286.

45.——Continuing Trespass.—Where defendant railroad so maintained an embankment, that at every rainfall destructive quantities of sand and material therefrom were cast on plaintiff's land, this constituted a continuing trespass, entitling plaintiff to an injunction and damages.—Heath v. Minneapolis, St. P. & S. S. M. R. Co., Minn., 148 N. W. 311.

46. **Insurance** — Accidental Injury.—Where an accident policy stipulated for payment of a specified sum on his death following total disability resulting immediately and continuously from accidental injuries, and insured continued working after his injury for several days, and was then operated on for appendicitis, and died his death was not within the policy.—Mullins v. Masonic Protective Ass'n., Mo., 168 S. W. 843.

47.——Equitable Owner.—A conveyance to insured of the fee before the policy was written by his wife's unwitnessed deed constituted him the equitable owner of the fee, with an insurable interest.—Padgett v. North Carolina Home Ins. Co., S. C., 82 S. E. 409.

48. **Justices of the Peace**—Void Judgment. —Injunction does not lie to restrain the enforcement of a void judgment of a justice, where the right of appeal has not expired.—Robinson v. Gibson, Tex., 168 S. W. 877.

49. **Landlord and Tenant**—Abandonment.—Where a tenant abandons the leased premises without the consent of the landlord who informs the tenant that he will relet the premises if possible and credit him with whatever is collected, the tenant is not relieved from liability for the rent.—Baldwin v. Lampkin, Ga., 82 S. E. 369.

50.——Priority.—Where defendant purchased property subject to a mortgage and leased a portion thereof to R., who assigned to plaintiff's assignor, who attorned to defendant's grantee, without plaintiff's consent to an assignment of the lease, there was neither privity of contract nor estate between plaintiff and defendant, and hence plaintiff was entitled to no more than nominal damages for breach of the covenant of quiet enjoyment by a foreclosure of the existing mortgage.—Wagner v. Van Schaick Realty Co., 168 N. Y. Supp. 736.

51.——Waiver.—Where a tenant from month to month gives notice of intention to quit, and remains in possession for a month after the time specified in his notice, he waives the notice and remains a tenant from month to month.—Kink v. Durkee-Atwood Co., Minn., 148 N. W. 297.

52. **Master and Servant**—Course of Employment.—A servant commits a tort in the course of his employment, for which the master is liable, if the act is committed while the servant is executing his agency, as an incident to carrying on the business of the master in the transaction of which he is then engaged.—Birmingham Ledger Co. v. Buchanan, Ala., 65 So. 667.

53.——Guarding Machinery.—The purpose of the Factory Act is to require dangerous machines to be properly guarded when in operation, and not to prohibit their use, or to make every manufacturer an insurer of employes working about dangerous machinery which cannot be guarded by any known device.—Wagner v. Standard Sanitary Mfg. Co., Pa., 91 Atl. 353.

54.——Guarding Machinery.—The words "properly guarded" in Act May 2, 1905 (P. L. 352), means suitably guarded, and the act does not apply where it is impracticable to guard the machine without rendering it useless for its purposes.—Shannon v. Carnegie Steel Co., Pa., 91 Atl. 357.

55.——Independent Contractor.—Owner of building employing an independent contractor to paint it, who suspended a stage over the sidewalk by guy ropes negligently fastened, so that a painter fell from the stage, and struck plaintiff on the sidewalk below, held not liable.—Weilbacher v. J. W. Putts Co., Md., 91 Atl. 343.

56.——Licensee.—A student brakeman performing tasks assigned to him by members of a train crew and doing whatever he was ordered to in the operation of the train was an employe, and not a licensee.—Rief v. Great Northern Ry. Co., Minn., 148 N. W. 309.

57.——Negligence.—The three elements essential to constitute actionable negligence on the part of a master where the wrong is not willful or intentional are a duty to protect the servant, failure to perform such duty, and injury proximately resulting therefrom.—Midland Valley R. Co. v. Williams, Okla., 141 Pac. 1103.

58.——Profit Sharing.—Under contract of employment by which employe was to receive share of profits, held that he was not entitled to a share of the profits on the unfinished product of a plant not ready for market when he quit the service.—Hartwell v. Becker, Mo., 168 S. W. 837.

59.——Respondeat Superior.—The owner of an automobile which was operated by his agent is liable for the negligence of the agent only when the agent was acting within the scope of his authority.—Barfield v. Evans, Ala., 65 So. 928.

60.——Safe Implements.—Where defendant did not furnish sticks to plaintiff with which to remove iron from a defective stamping machine, and plaintiff was injured while removing it with his hands, it was no defense that plaintiff could have removed it in safety with a stick which he could have procured with little trouble or expense.—Shimp v. Woods-Evertz Stove Co., Mo., 168 S. W. 811.

61.——Wrongful Discharge.—Where a contract of employment may, by its terms, be terminated "for any good reason," the sufficiency of a reason for discharge is open to judicial inquiry.—Caldwell v. Klyce, Wash., 141 Pac. 1042.

62. **Mechanics' Liens**—Identifying Material. —Where stone was bought and piled with stone purchased from others, without its identity being preserved and it was impossible to determine the origin of any particular part of the stone sold by the purchaser to a contractor and used in a building, the first seller was not entitled to a materialman's lien on the building.—Consolidated Stone Co. v. Union Pacific R. Co., Neb., 148 N. W. 318.

63. **Mines and Minerals**—Gas and Oil.—Gas and oil leases are apart by themselves, and while they slightly resemble coal or solid mineral leases, there is scarcely any comparison between them and ordinary farm or house leases.—Cooke v. Gulf Refining Co., La., 65 So. 758.

64. **Mortgages**—Defined.—A mortgage is, in equity, a hypothecation or pledge of property as security for a debt, and its effect is to leave the mortgagor personally liable for the balance of the debt, if on foreclosure, the property fails to yield a sufficient sum to pay it in full.—Stollenwerck v. Marks & Gayle, Ala., 65 So. 1024.

65.——Foreclosure.—A foreclosure sale of realty in which the mortgagor owns only a life estate conveys only such estate, though the purchaser supposes that he is buying the whole title.—Vandervort v. Finnell, Neb., 148 N. W. 332.

66.—Waste.—Obligation of mortgagees in possession to account for rents and profits or waste can only be enforced in equity; the mortgagee being regarded as the legal owner,

and his accountability for rent incident only to the right to redeem.—Harris v. Jones, Ala., 65 So. 956.

67. **Navigable Waters**—Change of Channel.—Where a stream comprises a boundary suddenly seeks a new bed, such change of channel, does not change the boundary from the center of the old channel, though no water flows therein.—Iowa Railroad Land Co. v. Coulthard, Neb., 148 N. W. 328.

68. **Negligence**—Child.—A child between 10 and 12 years of age, injured through the actionable negligence of another, and not possessing the discretion of the average child of 14, is entitled to recover, though his own carelessness proximately contributed to his injury.—Cedar Creek Store Co. v. Steadham, Ala., 65 So. 984.

69.——Independent Contractor.—Where a general contractor advertised for bids for cornices over windows, the bidder receiving the contract, subject to right of the general contractor to see that the work was executed in accordance with the plans, was an independent contractor and liable for the negligence of its employes causing injury to a third person.—Bacon v. Candler, Mich., 148 N. W. 194.

70. **Nuisance**—Prescription.—One may acquire a prescriptive right to maintain a private nuisance.—Atlantic Coast Line R. Co. v. Harwell, Ala., 65 So. 711.

71. **Partnership**—Fictitious Name.—Where a corporation acquires a right of action for breach of an implied warranty of machines sold to its predecessor it may sue thereon, though such predecessor was a partnership doing business under a fictitious name.—Standard Sewing Mach. Co. v. New State Shirt & Overall Mfg. Co., Okla., 141 Pac. 1111.

72.——Participation in Profits.—Mere participation in profits does not constitute a partnership, and it is a question of intention on the part of the alleged partners for determination by the triers of the fact from the circumstances and the nature and effect of the whole contract.—Hartwell v. Becker, Mo., 168 S. W. 837.

73. **Principal and Agent**—Implied Authority.—A traveling salesman, who takes orders by sample for future delivery and payment, has no implied authority to collect sums due his principal.—Lyles-Black Co. v. Alldredge, Ala., 65 So. 696.

74. **Principal and Surety**—Consideration.—A mere promise of a creditor to look to the principal debtor for payment does not discharge a surety, unless accompanied by some act of the creditor inducing the surety to surrender securities which he has received or to forego means of indemnity or protection.—Bank of Neelyville v. Lee, Mo., 168 S. W. 796.

75. **Railroads**—Proximate Cause.—Where a fire is started along the retaining wall in plaintiff's yard by sparks, and from thence is communicated to sheds, stables, and the main building in such a way that the burning is a continuous succession of events, the spark causing the first fire is the proximate cause of the damage.—Oakdale Baking Co. v. Philadelphia & R. Ry. Co., Pa., 91 Atl. 358.

76.——Warning.—Under peculiar circumstances or on extraordinary occasions a railway company must give warnings at some crossings in addition to those required by statute.—Roberts v. Maryland, D. & V. Ry. Co. (Lofland's Brickyard Crossing Cases), Del., 91 Atl. 285.

77. **Sales**—Caveat Emptor.—The maxim of caveat emptor does not apply where the defect in a machine sold by its manufacturer while it is new on the market is not discoverable on examination and renders the machine unsuitable for the ordinary work for which it is made.—Standard Sewing Mach. Co. v. New State Shirt & Overall Mfg. Co., Okla., 141 Pac. 1111.

78.——Executory Contract.—Agreement, in consideration of acceptance of draft to allow acceptor to hire a barge at a reduced rate and to forfeit the barge to the acceptor if the draft was not retired, held merely as executory contract and not a sale.—C. H. Minge & Co. v. Barrett Bros. Shipping Co., Ala., 65 So. 671.

79.——Refusal to Deliver.—Where a seller refuses to deliver as contracted, he is liable for an amount sufficient to cover the loss resulting therefrom.—W. H. Coyle Consol. Coa. v. Swift & Co., Okla., 141 Pac. 1114.

80.——Rescission.—Delay occasioned by a vain hope and fruitless effort to obtain the money from the defaulting buyer evidences an acquiescence in the delivery and acceptance of the buyer as a debtor.—Cincinnati Railway Co. v. Hartlick, U. S. C. C. A., 214 Fed. 177.

81.——Warranty.—Where the buyer ascertained that the piano bought under a conditional contract was not as warranted, and the seller neglected to make good, the buyer was not obliged to return the piano, in the absence of an agreement to that effect, as a condition precedent to his right to a rescission and return of the installments paid.—W. W. Kimball Co. v. Massey, Minn., 148 N. W. 207.

82.——Warranty.—A seller of machinery ordered for a particular purpose warrants it to be reasonably fit for such purpose.—Western Union Telegraph Co. v. Jackson Lumber Co., Ala., 65 So. 962.

83. **Trade Marks and Trade Names**—Good Faith.—One may not palm off his goods as the goods of a rival and thereby cheat the purchasing public and injure the business of the rival.—National Biscuit Co. v. Pacific Coast Biscuit Co., N. J., 91 Atl. 126.

84. **Vendor and Purchaser**—Failure of Consideration.—In an action on a purchase-money bond, where the sale has not been rescinded, false representations inducing it may be shown as evidence of a partial failure of consideration and in abatement of the debt.—Schmidt v. Frey, N. J., 90 Atl. 1123.

85. **Waters and Water Courses**—Diversion.—An upper riparian owner has no right to divert water from a stream for commercial purposes to such an extent that the lower riparian owner is deprived of its use.—Weidman Silk Dyeing Co. v. Jersey City Water Supply Co., N. J., 91 Atl. 337.

86.——Surface Water.—A proprietor of land may divert surface water, cast it back, or pass it along to the next proprietor, providing he can do so without injury to him, but no one can sacrifice his neighbor's property to protect his own.—Gulf, C. & F. Ry. Co. v. Richardson, Okla., 141 Pac. 1107.

87. **Wills**—Construction.—The rule that a gift of personalty for life without gift over passes the whole estate is a mere rule of construction in aid of discovering testator's intention, and not a rule of law.—In re Rogers' Estate, Pa., 91 Atl. 351.

88.——Intention.—No rule for the construction of wills can defeat the intention of the testator expressed in the will itself.—Lee v. Lee, Conn., 91 Atl. 269.

89.——Precatory Words.—No precatory words of the testator to his legatee or devisee can defeat a preceding absolute bequest or devise, nor can a clearly expressed purpose of the testator be overborne by modifying ambiguous directions.—Miller v. Stubbs, Pa., 90 Atl. 1132.

90.——Revocation.—At common law the subsequent marriage and birth of issue of a testator operated as an unqualified revocation of his will in toto unless there was a provision for a future wife and child or children, but birth of issue alone did not have such effect.—Woodliff v. Dunlap, Ala., 65 So. 936.

91.——Revocation.—A sale of realty after the execution of the will devising it revokes the will pro tanto, and the proceeds pass as personal property to the legatees, residuary or otherwise.—Stender v. Stender, Mich., 148 N. W. 255.

92.——Undue Influence.—That a favored legatee had succeeded in poisoning the mind of testatrix against a child practically disinherited does not alone justify an inference that the will was the result of undue influence.—Hills v. Hart, Conn., 91 Atl. 257.